

## The Honorable Tana Lin

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE/TACOMA

ANN MAYHALL, on behalf of her Minor Child,  
D.M., individually and on behalf of all others  
similarly situated,

Plaintiff,

V.

AMAZON WEB SERVICES, INC. and  
AMAZON.COM, INC.,

Defendant.

NO. 2:21-cv-01473-TL

## **JOINT STATUS REPORT AND DISCOVERY PLAN**

Plaintiff Ann Mayhall, on behalf of her Minor Child, D.M. (“Plaintiff”) and Defendants Amazon Web Services, Inc. and Amazon.com, Inc., by and through counsel, respectfully submit this Joint Rule 26(f) Report and Discovery Plan. Pursuant to Fed R. Civ. P. 26(f), the parties held a video conference on March 11, 2022.

## JOINT RULE 26(f) REPORT

## J. PROPOSER REARLINE FOR JOINING ADDITIONAL PARTIES

The parties believe a reasonable deadline for joining additional parties is October 28, 2022, which is six months before the proposed deadline for the class certification motion.

1      **II. CONSENT TO MAGISTRATE**

2      The parties do not consent to the transfer of this case to a Magistrate Judge.

3      **III. PROPOSED DISCOVERY PLAN**

4      **A. Exchange of initial disclosures:**

5      The parties agreed to exchange initial disclosures on March 25, 2022.

6      **B. Subjects, timing, and phasing of discovery:**

7      **Plaintiff's Position:** Plaintiff anticipates conducting discovery regarding the allegations  
 8      in the Complaint, Defendants' affirmative defenses (if any), and the opinions of any expert  
 9      witnesses. Plaintiff anticipates discovery will include discovery related to Defendants'  
 10     relationship with each other and with Take 2/2K ("Take-Two); the internal  
 11     organizations/divisions of Defendants related to the allegations in the Complaint; Defendants'  
 12     possession, collection, capturing, purchasing, receiving through trade, or otherwise obtaining  
 13     the information described in the Complaint; Defendants' security practices generally and with  
 14     respect to the information described in the Complaint; the technical components/workings of  
 15     the creation, processing, transmission, storage, access to, use of, and/or security over the  
 16     information described in the Complaint; Defendants' knowledge of the NBA 2K games, apps,  
 17     and customized player feature described in the Complaint; Defendants' CloudFront service as  
 18     described in the Complaint; Defendants' knowledge of and compliance with privacy rights  
 19     related to biometric data, including BIPA, including internal decision-making regarding  
 20     whether to, or how to, comply with BIPA; and information about class members. Plaintiff  
 21     further anticipates conducting discovery regarding the issues identified by Defendants below.

22      The parties agree that there is no need to phase certification and merits discovery.

23      Plaintiff opposes Defendants' request to stay discovery and all proceedings while their Motion  
 24     to Dismiss is pending. *See Blackstone Int'l v. E2 Ltd.*, No. C20-1686-RSM, 2022 U.S. Dist.  
 25     LEXIS 31095, \*4 (W.D. Wash. Feb. 22, 2022) ("[A] pending motion to dismiss does not  
 26     ordinarily warrant a stay of discovery, [though] a stay may be appropriate where issues of

1 jurisdiction or immunity are raised in the dispositive motion.”) (citing *Williams v. Sampson*,  
 2 No. C17-0092-JCC, 2017 U.S. Dist. LEXIS 55461, \*3 (W.D. Wash. Apr. 11, 2017)  
 3 (“[A] pending Motion to Dismiss is not ordinarily a situation that in and of itself would warrant  
 4 a stay of discovery. Common examples of such situations, however, occur when jurisdiction,  
 5 venue, or immunity are preliminary issues.”) (quoting *Twin City Fire Ins. Co. v. Employers Ins.*  
 6 *of Wausau*, 124 F.R.D. 652, 653 (D. Nev. 1989)); *Wilmington Tr. Co. v. Boeing Co.*, C20-  
 7 0402-RSM-MAT, 2020 U.S. Dist. LEXIS 190642, \*4 (W.D. Wash. Oct. 14, 2020) (“A party  
 8 seeking to stay discovery bears a ‘heavy burden’ to make a ‘strong showing’ of why discovery  
 9 should be denied. . . . Neither the mere existence of a potentially dispositive motion, nor mere  
 10 inconvenience and expense suffice to establish good cause for a stay. . . . The decision to  
 11 relieve a party from the burdens of discovery while a dispositive motion is pending ‘is the  
 12 exception and not the rule.’” (citations omitted)).

13 Here, Defendant’s Motion to Dismiss does not raise preliminary issues of jurisdiction,  
 14 venue, or immunity. Instead, as Defendants clarify in the paragraph below, most of the  
 15 defenses they have raised in their motion are factual defenses that are contrary to the  
 16 allegations of the Complaint. Discovery is therefore needed to gather facts to properly analyze  
 17 Defendants’ assertions, including those set forth below that “Defendants do not collect or  
 18 possess biometric information” that “Defendants have no relationship with Plaintiff” that  
 19 Defendants “did not interact with Plaintiff” and that “their sole role is to provide web hosting  
 20 services.” Moreover, this case will involve technical discovery that will take time and expertise  
 21 to gather and analyze, and with a class certification briefing deadline only 11 months away, any  
 22 delay caused by a stay of discovery while a motion to dismiss is pending would cause Plaintiff  
 23 undue prejudice. If a stay of discovery is granted, Plaintiff requests that the parties be allowed  
 24 to submit a new proposed schedule and trial date within 14 days after the Order on the Motion  
 25 to Dismiss.  
 26

1       **Defendants' Position:** Defendants believe that discovery should be stayed pending the  
 2 Court's decision on their pending motion to dismiss. As explained in Defendants' motion, the  
 3 Illinois Biometric Information Privacy Act does not apply to Plaintiff's claims because they  
 4 have failed to adequately allege that Defendants collect or possess biometric information. As  
 5 Plaintiffs' Complaint tacitly concedes, Defendants have no relationship with Plaintiff and did  
 6 not interact with Plaintiff, as Defendants' sole role is to provide web hosting services for data  
 7 that is owned by Take-Two. Contrary to Plaintiffs' argument, those are not "factual defenses"  
 8 that require discovery; Plaintiffs' Complaint fails on its face as a matter of law, for reasons that  
 9 cannot be cured. Defendants' motion to dismiss raises substantial, case-dispositive issues and  
 10 Defendants respectfully submit that discovery, which is likely to be protracted and burdensome,  
 11 should not proceed until the Court determines whether Plaintiff has stated a viable claim.

12       Plaintiffs' position statement above, and their one-sided citation to a handful of cases, is  
 13 an improper attempt to turn this Joint Status Report into a motion. Defendants will not engage  
 14 in de facto motion practice outside the Court's rules and procedures. If the Court would benefit  
 15 from briefing on the propriety of a stay in these circumstances, Defendants respectfully request  
 16 an opportunity to brief that issue.

17       When and if discovery proceeds, Defendants anticipate conducting discovery regarding  
 18 the contractual relationship between AWS and Take-Two; the geographic location in which the  
 19 relevant conduct alleged in the Complaint occurred; the role of Defendants as it relates to the  
 20 conduct alleged in the Complaint; and Plaintiff's specific claims. Defendants also reserve the  
 21 right to take discovery on issues identified by Plaintiff above.

22       **C. Electronically stored information:**

23       At this time, the parties do not anticipate any issues regarding the preservation or  
 24 production of electronically stored information. The parties agree to take reasonable steps to  
 25 preserve all relevant electronically stored information. The parties anticipate using the Model  
 26 Protocol for Discovery of Electronically Stored Information, with certain agreed-upon

1 revisions. The parties anticipate submitting an agreed ESI order on or before April 8, 2022.

2       **D.      Privilege issues:**

3       The parties do not see any unique privilege issues in this case. The parties will make  
 4 claims of privilege or of protection of trial preparation materials at the time of production, and  
 5 will meet and confer regarding the need for and scope and timing of privilege logs. The parties  
 6 will use the Court's Model Protective Order, with agreed-upon revisions, which also addresses  
 7 the claw-back of documents pursuant to Fed. R. Evid. 502(b). The parties anticipate  
 8 submitting an agreed Protective Order on or before April 8, 2022.

9       **E.      Limitations on discovery:**

10      Due to the nature of this case, plaintiff requests that the parties be exempted from  
 11 compliance with Federal Rules of Civil Procedure 30(a)(2)(A) (10 deposition limit) and 33(a)  
 12 (25 interrogatory limit). Plaintiff requests that the number of interrogatories, including  
 13 subparts, to each party be limited to 35 and the number of depositions to each party be limited  
 14 to 15 without further leave of court.

15      Defendants oppose Plaintiff's position and request that the limitations of Rule  
 16 30(a)(2)(A) apply in this case. There is nothing about the "nature of this case" that would  
 17 justify expanding those limits, especially as drastically as Plaintiff requests. If discovery  
 18 limitations become an issue as discovery proceeds, Defendants will meet and confer with  
 19 Plaintiffs to discuss any such issues.

20       **F.      Discovery related orders:**

21      In addition to the ESI Protocol and Protective Order discussed above, Plaintiff intends  
 22 to request production of source code related to the processing, transmission, and storage of the  
 23 data described in the Complaint. Amazon anticipates objecting to production of source code,

1 which is highly confidential and irrelevant to Plaintiff's allegations. If production of source  
 2 code is ordered, the parties anticipate negotiating a protective order governing any disclosure  
 3 of source code, and will attempt to resolve any differences related thereto without resorting to  
 4 the Court unless necessary.  
 5

6 **IV. LOCAL CIVIL RULE 26(1)**

7       **A. Prompt case resolution:**

8       The parties believe it is too early to assess prompt settlement at this point. The parties  
 9 have provided below a proposed schedule to permit resolution of this matter promptly.

10      **B. Alternative dispute resolution:**

11      The parties agree that mediation per LCR 39.1 may be useful in the future. If the  
 12 parties agree to mediation, the parties expect that such mediation would occur following the  
 13 filing of motions for summary judgment. The parties do not consent to the Individualized Trial  
 14 Program under LCR 39.2.  
 15

16      **C. Related cases:**

17      There are no other related cases.

18      **D. Discovery management:**

19      The parties agree to exchange discovery electronically when possible to minimize  
 20 expense. The parties agree to accept service of discovery via email service to all counsel of  
 21 record. The parties agree that all discovery exchanged will be bates numbered by the  
 22 producing parties. The parties anticipate the ability to manage discovery on their own and do  
 23 not at this time anticipate the need for formal discovery management. The parties will share  
 24 discovery obtained from third parties. The parties will comply with the requirements of LCR  
 25 37 and the Court's standing order for resolving any discovery disputes.  
 26

1           **E. Anticipated discovery sought:**

2           The discovery the parties anticipate seeking is set forth in section IV.B, above.

3           **F. Phasing of motions:**

4           The parties agree that the filing deadline for class certification shall be on February 24,  
5 2023 and the filing deadline for dispositive motions shall be on August 21, 2023, as set forth in  
6 the proposed schedule below.

7           **G. Preservation of discoverable information:**

8           The parties will comply with all requirements regarding preservation of discoverable  
9 information and do not anticipate any issues regarding preservation.

10          **H. Privilege Issues.**

11          The parties will use the Court's Model Protective Order, with certain agreed-upon  
12 revisions, which also addresses the claw-back of documents pursuant to Fed. R. Evid. 502(b).

13          **I. Model Protocol for discovery of ESI:**

14          The parties will use the Model Protocol for Discovery of Electronically Stored  
15 Information, with certain agreed-upon revisions. The parties anticipate submitting an agreed  
16 ESI order on or before April 8, 2022.

17          **J. Alternatives for Model Protocol:**

18          The parties will use the Model Protocol for Discovery of Electronically Stored  
19 Information, with certain agreed-upon revisions. The parties will also use the Court's Model  
20 Protective Order, with certain agreed-upon revisions. The parties anticipate submitting the ESI  
21 Protocol and Protective Order to the Court on or before April 8, 2022.  
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1      **V. DISCOVERY COMPLETION DATE**

2      The parties proposed deadlines are:

3 <b>EVENT</b>	4 <b>DATE</b>
5      Deadline to Join Additional Parties	6      September 16, 2022
7      Deadline to Amend Pleadings	8      September 16, 2022
9      Motion for Class Certification	10     February 24, 2023
11     Response to Motion for Class Certification	12     45 days after filing of motion
13     Reply in Support of Motion for Class Certification	14     30 days after filing of response
15     Fact Discovery Cutoff	16     May 26, 2023
17     Plaintiff's Expert Disclosure	18     June 16, 2023
19     Defendant's Expert Disclosure	20     July 17, 2023
21     Rebuttal Reports	22     August 16, 2023
23     Summary Judgment Motions	24     September 8, 2023
25     Trial	26     December 2023/January 2024

16      **VI. BIFURCATION**

17      The parties agree that the issues in this case should not be formally bifurcated.

18      **VII. USE OF INDIVIDUALIZED TRIAL PROGRAM**

19      The parties do not intend to use either the Individualized Trial Program or the available  
20 formal ADR option at this time. The parties do agree, however, that mediation may be  
21 appropriate in the future.

22      **VIII. SUGGESTIONS FOR SHORTENING OR SIMPLIFYING CASE**

23      Plaintiff has no suggestions for shortening or simplifying this case. The stay of discovery  
24 proposed by Defendants will lengthen the case by requiring an adjustment to the proposed  
25 schedule above.

1 Amazon submits that staying discovery until the Court rules on Amazon's pending  
2 motion to dismiss has the potential to shorten or simplify the case by narrowing (or eliminating)  
3 the issues for trial.  
4

5 **IX. DATE THE CASE WILL BE READY FOR TRIAL**

6 The parties believe that this matter will be ready for trial by December 2023/January  
7 2024.  
8

9 **X. JURY TRIAL**

10 Plaintiff has requested trial by jury.  
11

12 **XI. LENGTH OF TRIAL**

13 The parties anticipate 7 to 10 days for trial.  
14

15 **XII. ADDRESSES OF COUNSEL**

16 See below.  
17

18 **XIII. TRIAL COUNSEL COMPLICATIONS**

19 Trial counsel do not currently have any dates that would pose complications to the  
20 schedule.  
21

22 **XIV. SERVICE OF COMPLAINT**

23 Defendants have accepted service of the Complaint.  
24

25 **XV. SCHEDULING CONFERENCE**

26 The parties believe a scheduling conference to discuss the issue of staying discovery  
while their motion to dismiss is pending, and to answer any questions the Court may have  
regarding the Parties' proposed schedule, would be beneficial.  
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1      **XVI. DATES ON WHICH CORPORATE DISCLOSURES FILED**

2      Plaintiff is an individual and is not required to file a corporate disclosure statement.

3      Defendants filed their corporate disclosure statement on March 24, 2022.

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5      DATED this 25th day of March, 2022.

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